

STATE OF NEW HAMPSHIRE

INTER-DEPARTMENT COMMUNICATION

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Bureau Administrator

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Offices

Dept of Environmental Services
Water Division

SUBJECT Proposed WQSAC topics for
Changes to RSA 485-A

TO Water Quality Standards Advisory
Committee

SITUATION

House Bills 1305 and 1348 in the 2010 session, requested by the Department of Environmental Services (DES), were referred to interim study by the House Resources, Recreation, and Development Committee (RR&D), with the recommendation that the Water Quality Standards Advisory Committee (WQSAC) review the bill language, receive input from DES and other stakeholders, and develop recommended bill language for the 2011 legislative session, in collaboration with RR&D. This process would begin with the June [May?] WQSAC meeting, and conclude by October 1, 2010, in time for bills to be introduced for the 2011 session.

In summary, the intent of HB 1305 and 1348 is to:

- 1) Clarify the RSA 485-A definition of surface waters so that it is consistent with the Clean Water Act and with RSA 483-A
- 2) Specify in statute all the designated beneficial uses of New Hampshire surface waters
- 3) Incorporate Clean Water Act antidegradation requirements into statute.
- 4) Make all activities that cause violations of surface water quality standards unlawful and give DES enforcement powers. Current law is limited to discharges that cause violations.

BACKGROUND

Surface water quality standards (WQS) are a powerful framework for social and political decision-making about water resources. The federal Clean Water Act (1972) created a national process in which states are responsible for adopting WQS that include: Designated Uses; Criteria to support the uses, and; an Antidegradation Policy. New Hampshire, like other New England states, had created a surface water classification system and adopted WQS prior to 1972, so the existing statutory language (now RSA 485-A:8 through 12, with some definitions in RSA 485-A:2) was adapted to meet federal Clean Water Act requirements, and some of the federal requirements were incorporated into rules (now Env-Wq 1700) rather than statute.

DES believes that it is time to change some of the statutory WQS language to make the standards more transparent, understandable, and enforceable. There are four topic areas in the proposed legislation, as described briefly below. We would like WQSAC consider these proposed statutory changes in the same manner as the committee has considered DES' proposals for rules and guidance, under the committee's terms of reference. We suggest the creation of four working groups corresponding to these topic areas. This would facilitate progress on the topics in between WQSAC meetings and enable us to meet deadlines for submitting legislative proposals for in fall 2010 for the 2011 legislative session.

SUMMARY OF WQSAC TASKS

I. Definition of surface waters and wetlands

RSA 485-A has a definition for surface waters, whereas Env-Wq 1700 has a different definition for "surface waters" and adopts the RSA 482-A definition for wetlands. RSA 482-A has a definition for wetlands, and defines the "waters of the state" to which the wetlands statute applies. Env-Wt 100-800 has a slightly different definition for "surface water body or surface waters", and defines various kinds of wetlands.

Further, it is a requirement for federal approval of WQS that they apply at least to all "waters of the US" that are under Clean Water Act jurisdiction. Prior to the Supreme Court decision in *Rapanos v. United States*, the 1987 Corps of Engineers Wetlands Delineation Manual was the authoritative reference for identifying wetlands that are "waters of the US". Now, the *Rapanos* decision requires that, in addition to meeting the 1987 Corps manual delineation requirements, wetlands (and other waterbody types) must also have a "significant nexus" to navigable-in-fact waters.

The task of WQSAC would be to sort all this out and make recommendations for changes to statute (primarily RSA 485-A) and rule that would make it clear to what surface waters and/or wetlands WQS apply, and also make it clear in statute that this is at least all the "waters of the US" under federal Clean Water Act jurisdiction.

II. Specify Designated Beneficial Uses in statute

The Clean Water Act requires WQS to specify designated uses for all surface waters and to identify criteria to support the uses. New Hampshire's designated uses are hard to find in either RSA 485-A or in Env-Wq 1700. In fact, the only place they are explicitly listed is in the Consolidated Listing and Assessment Methodology (CALM), a guidance document published by DES every two years in association with the assessment of surface waters required by Clean Water Act section 305(b).

The task of WQSAC would be to review the CALM list of designated uses in light of the current statutory and rule language, review other states' designated uses, and recommend statutory language that clearly lists and defines New Hampshire's designated uses.

III. Incorporate the Clean Water Act antidegradation requirements into statute

In addition to designated uses and criteria to support the uses, WQS are required under

40cfr part 131.12 to contain an antidegradation policy (the federal rule says “policy”, but really means “statute or rule”). The federal rule language is fairly straightforward, but hard to implement. It is also a potentially powerful and far-reaching element of WQS that has perhaps been underutilized in the past. Env-Wq 1708 contains New Hampshire’s antidegradation policy, which attempts to state the antidegradation requirements and the somewhat convoluted implementation process all at the same time. DES believes that antidegradation should be in statute because it is an essential element of WQS, and also that the antidegradation requirements should be separate from the implementation procedures.

The task of WQSAC would be to review 40cfr part 131.12 and Env-Wq 1708, perhaps look at other states’ antidegradation processes, and recommend changes to statute and/or rule to better incorporate and explain antidegradation.

IV. Make all activities that cause violations of surface water quality standards and give DES enforcement powers

RSA 485-A:12 directs DES to enforce WQS, but the statutory language only deals with discharges that cause WQS violations. Early in Clean Water Act implementation (~1970’s), discharges were practically the only activities that were considered to cause surface water problems. We now know that other activities, not involving discharges, can also result in WQS violations. The best example is water withdrawals or diversions, which involve no discharge but may result in damage to aquatic life. Likewise, extensive removal of canopy cover on small order streams that support cold water fish (trout) can result in summer water temperature increases that result in extirpation of trout. DES is currently working on numeric temperature standards, the implementation of which may involve specifications for maximum temperatures in identified cold water fisheries. Preservation of canopy cover could be an important factor in meeting the temperature criteria, but involves no discharge.

The task of WQSAC would be to review RSA 485-A:12 and WQS, ascertain if there is in fact a gap between the statute’s requirement that DES “enforce such classification....” and the tools in the statutory language to do so, and make recommendation for any appropriate statutory language changes.